EQUITY CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH-CAROLINA.

JUNE TERM, 1839.

Alexander S. Field, adm'r. of Charles G. Field,
v.
Wm. & Thos. B. Eaton, Ex'rs. of Thos. Eaton.
} From Warren.

A testator bequeathed a large estate, in land and slaves, to his son, and by a subsequent clause of the same will, gave one of the same slaves to his daughter. *Held* that the legatees took the slave by specialties.

The son claimed the slave by a gift prior to the will; but as he had taken other property under the will, *held* that he had made his election, and could not claim against it.

There being no *latent* ambiguity, but plain contradictory bequests, *held*, that parol evidence was inadmissible to prove the testator's intention to give the property to the son.

Where there is an *latent* ambiguity, but plain contradictory bequests, parol evidence of the testator's intention is inadmissible.

The bill was filed in the year 1817. The original parties to it were *Charles G. Field* and *Harriet* his wife, Plaintiffs, and *William* and *Thomas B. Eaton*, executors of their father *Thomas Eaton*, Defendants. During the pendency of the suit, the original Plaintiffs died, and it was prosecuted in this Court by the Plaintiff *Alexander S. Field*, the administrator de bonis non, of *Charles G. Field*.

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The facts admitted by the pleadings were, that the testator of the Defendants, by his will, gave a large estate to his son, the Defendant *William*, consisting of lands and slaves—among the latter was a female slave by the name of *Sal*. In a subsequent clause of his will, the testator gave the same negro to his daughter *Harriet*, the wife of the original Plaintiff *Charles G. Field*. Both bequests were in the same words, viz. "Sal and all her increase since 1804." The Defendant *William Eaton*, in his answer, claimed the girl *Sal* and her increase, under a parol gift made before the year 1804, and insisted that it was the intention of the testator to confirm the prior gift to him, and that the mention of her name in the gift to *Harriet*, was a mistake. Evidence of the testator's intention was taken and filed, but it is unnecessary to give a statement of it, as it was deemed inadmissible.

Badger, for the Plaintiff, upon the effect of the contradictory bequests, cited *Coke Lit.* 112, *b. note* 1. *Paramore* v. *Yardley* (*Plowd.* 541) *Wykham* v. *Wykham* (18 *Ves.* 421) *Ulrick* v. *Litchfield* (2 *Atk.* 373). Upon the incompetency of the evidence, also he cited *Ulrick* v. *Litchfield*.

Seawell, contra.

TOOMER, Judge.—His Honor (after stating the facts admitted by the pleadings, proceeded) there is undoubtedly a contradiction, and repugnancy in the bequests contained in this will. The testator first gives *Sal* by name to his son *William*. He then gives her in the same way to his daughter *Harriet*. The inquiry is, what was the intention of the testator, as it is to be collected from the face of the will. If such an intention can be ascertained by looking at the will, and it be in violation of no principle of law, it is the duty of the Court to give it effect. In the construction of wills, the testator's meaning is to be

discovered from the will itself, taking in aid the general rules of construction, established by former decisions. (*Noel* v. *Weston*, 4 *Ves. & Bea.* 271.) In cases of such direct contradiction and absolute repugnancy, the intention of the testator cannot be discovered from the face of the will.

It is manifest, the chattel was *intended* for one or both of the legatees; it is not one of those cases, in which the bequest is void for uncertainty. It is then necessary to establish some rule of construction, prescribing who is under such circumstances to take the legacy, and in what manner, in order to preserve the peace of society, and to prevent future litigation. If we cannot ascertain the *intent* of the testator, by looking at the will, we next inquire what construction the law has imposed on such inconsistent bequests? In such case no rule of construction has been established in this State. We must then resort to the adjudications of that country, from which the elementary principles of our system of jurisprudence have been derived. *There* we find a great contrariety of opinion. Some thought, that both devises were void for uncertainty. (*Owen* 84.) Lord *Coke* held, that in two different devises of the same thing, the last should take place; others have concurred with him in saying, that the second devise revokes the first. (*Cruise Dig. Tit. Devise, ch.* 9, *sec.* 22.) In *Paramore* v. *Yardley*, (*Plow.* 539, 541.) it is said, the legatees shall take as joint-tenants. Of this opinion was *Swinburne*. In *Ulrick* v. *Litchfield*, (2 *Atk.* 374,) Lord *Harwicke*, referring to the case of *Paramore* v. *Yardley*, said, "the reasoning in in *Plowden* is not convincing to me. I rather incline to Lord *Coke's*, *though the latter cases have taken it otherwise.*" In *Ridout* v. *Pain*, (3 *Atk.* 493.) Lord *Hardwicke* again says, "the law presumes that a testator, even in making his will, may vary his intention. As suppose a man gives a farm in Dale to A and his heirs in one part of his will, and in another to B and his heirs

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it has been held by the *old books* to be a *revocation*; but latterly construed either a *joint tenancy*, or *tenancy in common*, according to the limitation." The opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties. (*Coke Litt.* 112, *b. note* 1—*Cruise's Dig. Devise ch.* 9, *sec.* 22—*Paramore* v. *Yardley*, *Plowden* 541—*Anonymous*, *Cro. Eliz.* 9—*Coke* v. *Bullock*, *Cro. Jac.* 49.) If a thing be given in one part of a will to one, and in another part to another, the devisees shall take in moieties. (*Edwards* v. *Symons*, 6 *Taunt.* 361.)

I shall not attempt astutely to assign the reasons of these conflicting opinions; nor shall I *vainly* attempt to reconcile them. Distinguished jurists of modern times, with all the wisdom of former ages, and all the lights of experience before them, have sanctioned the opinion expressed in *Plowden*, that the devisees shall take in moieties: rejecting the old doctrines, that the devises are void for uncertainty; and that the latter devise is a revocation of the former. I shall adopt the modern opinion, and declare that these legatees take in moieties; solacing myself with the reflection, if it be erroneous, that it is the accepted opinion of modern times—is supported by the greatest number of authorities—and has the sanction of distinguished names.

The Defendant *William Eaton*, alleges, that *Sal* had been given to him, and put in his possession by the testator, in the year 1803 or 1804, long anterior to the making of the will, was his property when the will was executed, and the testator had no right to dispose of her by his will, and has filed several depositions to establish that fact. But it appears that *William Eaton* has taken a large estate under the will, and has thus made his election.

The general rule is, that a person cannot reject and accept the same instrument—he cannot claim under and against it. It is a rule of law as well as of equity, and

applies to every species of instrument, whether a deed or a will. (*Birmingham* v. *Kirwan* 2 *Scho. & Lef.* 449). A person shall not claim an interest under an instrument, without giving full effect to it, as far as he can, renouncing any right or property, which would defeat the disposition made in the will. The ground is the *implied condition*, upon *intention*, though from mistake. (*Thellusson* v. *Woodford*, 3 *Ves.* 220). A condition is *implied*, either that the devisee shall part with his own estate devised by the will, or shall not take the bounty of the testator, declared in the will. (*Broome* v. *Monck* 10 *Ves.* 600. *Andrew* v. *Trinity Hall*, 9 *do.* 533). He shall not defeat the disposition made by the will, and yet take under that instrument. He must make his election.—*Here*, the Defendant *William Eaton* has made his election, and has taken a large estate under the will. He cannot now deny the right of the testator to bequeath *Sal*, but must submit to that disposition of her, which has been made by the will.

It is contended, that the testator, in bequeathing slaves to the Defendant, which had been given him, long anterior to the making of the will, *did not intend* to interfere with Defendant's rights under the antecedent gift; and a deposition has been filed to show such intention. But Defendant has taken a large estate under the will, including much property to which he had before no title. He has thus made his election, and cannot take both under and against the will. This is a conclusion of law, founded on the doctrine of election. It is not necessary now to enquire, whether the Defendant can contradict this conclusion by parol testimony; or whether he be not estopped from denying it. This is not the point of difficulty in the case. The same slave has been bequeathed by one clause of the will to *William*, and by a subsequent clause to *Harriet*. The purpose of introducing the parol testimony is, to show that the testator did not intend to bequeath any interest in *Sal* to the legatee *Harriet*, and

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thus defeat the bequest to her. Such evidence will be contradictory to the plain language of the will. The law excludes, from principle and policy, the introduction of parol evidence, to contradict or alter instruments of writing. They are presumed to be repositories of truth. Principle prohibits it, because such instruments are, in their nature and origin, entitled to higher credit, than that which appertains to parol evidence. Policy forbids it, because it would be followed by mischievous and inconvenient consequences. (3 *Stark. on Ev.* 993). The law permits the introduction of parol evidence to explain some cases of ambiguity in instruments of writing. *Latent* ambiguities, such as are not apparent on the face of the instrument, may be explained by parol testimony.—But such evidence is inadmissible to explain a *patent* ambiguity, one apparent on the face of the instrument. (3 *Starkie on Ev.* 1000.) There is a repugnancy in the bequest of the same slave, in one clause to *William*, and in a subsequent clause to *Harriet*, but no ambiguity, and if it be called an ambiguity, it is *patent*, apparent on the face of the instrument; and by the settled rules of law, not susceptible of explanation by parol evidence. It cannot be competent for *William*, to contradict by parol testimony the intention of the testator, as is plainly expressed in his written will; to contradict the plain language of that will, and thus defeat the bequest to *Harriet*, and deprive her of that property which she claimed by a paper title. It is not believed that parol evidence is admissible to show, that the testator did not *intend*, what he plainly declared in his will. *Lord Hardwicke* says, in *Ulrick* v. *Litchfield*, (2 *Atk.* 378) that upon the construction of a will, Courts of Law and Equity admit parol evidence, only in two cases—first, to ascertain the person, where there are two of the same name, or where there has been a mistake in a christian or sirname; the second case is, with regard to resulting trusts relating to personal estates.

These are cases of latent ambiguity—there are others which are embraced by the same principle.

PER CURIAM.—Declare the Plaintiff and the Defendant *William*, to be entitled to the slave and her increase, in moieties, and direct an account of the profits of their labour.

John Peace, adm'r. of John Dickinson, v. William Nailing et al. } From Granville.

A Court of Equity will not relieve against a judgment at law, unless the Defendant was ignorant of the fact in question pending the suit, or it could not be received at law, as a defence.

Courts of Equity do not allow appeals to them merely to obtain a new trial. And where a party, on being sued at law, attempted to establish a legal defence before the jury, and was unsuccessful, he cannot, on the same facts, obtain relief in Equity.

The bill alleged, that administration upon the estate of one *Frances Chaves*, was committed to the Defendant *Smith*, who gave the Defendant *Nailing* and one *Pope*, as sureties for the due administration thereof—that the estate was sold by the administrator on the 24th of Feb. A. D. 1785—that two negroes were then purchased by one *John Dickinson*, for £132 10s. who gave bond to the administrator for the purchase-money, which bore date the 24th of February, A. D. 1785, and was payable six months thereafter. That the bond of *Dickinson* was delivered on the next day by *Smith* to *Nailing*, to indemnify him for his liability on the administration bond, and was endorsed by the obligee. That on the 15th of August, 1785, before the bond was payable, and while it was held by *Nailing*, *Smith* gave *Dickinson* a receipt, stating it to be in full satisfaction of the bond; but which was not surrendered to the obligor. That *Dickinson* died in April, 1802, and administration of his estate was granted in

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November, 1806, to the Plaintiff. That suit was brought on the bond in the fall of 1806, in the *name* of the *obligee*, against the Plaintiff, as *executor de son tort* of *Dickinson*. That the Plaintiff made the best defence in his power, but a verdict was obtained against him in March, 1808, for the full amount due on the bond. That he offered in evidence the above described receipt, and such other proof as he had it in his power to command; but the Court protected the endorsee, because the presumption created by the endorsement was not, nor could it then be repelled by the Plaintiff's proof. That after the trial at law, he learnt from one *Mills*, that no other consideration was given for the endorsement of the bond, than that which has been already stated; and that *Nailing* had never suffered in any way by his suretyship, and was not likely to suffer. The bill was filed on the 12th of April, 1808, and prayed for an injunction to restrain proceedings on the judgment at law, and for general relief. At September Term, 1808, "the injunction was dissolved with costs;" and on motion of the Plaintiff, the cause was continued, and held over as an original bill.

Ruffin, with whom was *Devereux*, for the Defendant, moved to dismiss the bill, upon the ground that there was complete relief at law, and cited *Gatlin* v. *Kilpatrick* (1 *Car. Law Repository* 534) *Fentriss* v. *Robins* (*N. C. Term Re.* 17) *Floyd* v. *Jayne* (6 *John. Ch. Rep.* 479) *Simpson* v. *Heart* (14 *John. Rep.* 63.)

Winston, *contra*.

TOOMER, Judge.—After stating the facts of the case, as above, proceeded—It is moved to dismiss the bill for want of equity. For the purposes of this motion, the allegations of the Plaintiff are taken to be true; and no other part of the pleadings is looked into. With this concession, it is insisted by the Defendants, that the Plaintiff is not entitled to the interference of this Court.

On application for equitable relief, it is not sufficient to show, that injustice has been done. It must also be shown, that the Court will be warranted in exercising its power. Equity does not interfere, on the ground that an unconscientious verdict has been obtained at *law*, unless it were not competent to the complaining party, to make his defence in a Court of Law. (*Bateman* v. *Wilcox* (1 *Scho. & Lef.* 201—204. *Jones* v. *Jones*, *N. C. Term Rep.* 110). As the allegations of the bill are taken to be true, the transaction may be viewed, as if the money due on the bond had been paid by *Dickinson* to *Smith*, on the 15th of August, 1785, however improbable it may be, that the payment was then made. The bond had not become payable; it was then in possession of *Nailing*; no notice of payment given to him; the surrender of the bond not required by the obligor; the receipt not setting forth what had been received in payment, but simply stating, "received in full satisfaction of the bond, &c." These circumstances are well calculated to excite suspicion that payment had not been made; and that some contrivance was designed, to deprive *Nailing* of the security on which he relied. But these presumptions are all waived. It is now conceded that the bond had been paid; and it is clearly unconscientious to enforce payment a second time for the same debt. Can this Court, under these circumstances, interpose to prevent this act of injustice? Relief cannot be extended, if it were competent to the Plaintiff to make his defence at law.

The action was brought on the bond, in the name of the obligee, against the Plaintiff, as *executor de son tort* of the obligor. If payment had been made on the 15th of August, 1785, as is alleged in the bill, that defence would have availed the Plaintiff at law. The suit was brought on a sealed instrument; payment at the day might have been pleaded, and the receipt, although without seal, could have been given in evidence to support that plea. This principle has been sanctioned by the

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uniform practice of our Courts of Law. (*McDowell v. Tate, ante* 1 *vol.* 251.) I do not know that the correctness of this practice has ever been questioned in our Courts; nor was it doubted in the case now under consideration, so far as we can discover from the bill. The right of the obligor to prove by *parol*, the performance of the conditions, and payment at the day, and thus to discharge himself from the obligations of his deed, has not been denied. Tender and refusal are facts, which can only be proved by parol; and when made on the day, if the money be brought into Court, and the plea of tender and refusal be supported by parol proof, it will defeat the action of the obligee. If the obligation be not for the payment of money, but for the performance of some collateral act, requiring the concurrence of the obligee, and there be an offer by the obligor to perform, and the performance be prevented by the obligee, which are facts only to be proved by parol, such proof will discharge the obligor, although bound by deed. (*Mitchell v. Patillo*, 2 *Hawks* 40.) It has also been understood, that the statute of 4 *Ann*, *ch.* 16, *sec.* 12, which allows the obligor, when sued in debt on a single bill, to plead payment in bar, is in force in this State. This has been the uniform understanding of the profession, and it has governed their practice. But if the old principle of the common law be contended for, that when the action is brought on a deed, it can only be avoided by matter of *as high a nature*, as by an acquittance under seal; and that the statute of 4 *Ann* is not in force here; still it is insisted, complete defence could have been made at law, either on the plea of payment at the day, condition performed, or accord and satisfaction. The bill does not state the character of the specialty, but speaks of it as the bond of *Dickinson*; from which it is to be inferred, that it was a penal bond, conditioned for the payment of £182 10s. six months after date. Were it a penal bond, the plea of "payment at the day" would have been good

at common law, for it is the performance of the condition. (*St. Germain's Doctor & Stud.* 107). Payment before the day could be given in evidence, and the money would be considered as a deposit in the hands of the obligee, till the day of payment arrived, when it would, in legal contemplation, be applied. (7 *Mod. Rep.* 231). The plea of condition performed, would have answered the like purpose. (*Anonymous, Croke Eliz.* 46.) Had the obligor paid money or other equivalent, when the receipt was given, and it had been accepted by the obligee, in full *satisfaction* of the *condition* of the bond, then the obligor would be protected under the plea of "accord and satisfaction." That payment was *made* and *accepted* in full satisfaction, is averred in the bill. As the condition was performed before the day, if less than the sum due were paid and accepted in full satisfaction, it would be a discharge. Because part of the debt before the day, may be more beneficial to the obligee, than the whole at the day. (*Pinnell's case*, 5 *Rep.* 117, *a.*)

It is not alleged in the bill, that the Plaintiff did not make defence at law. He avers that he made all the defence in his power, and that he gave the original receipt in evidence, to show that the bond had been paid by *Dickinson*. It is not pretended by the Plaintiff, that he was met by any technical difficulties, which prevented an investigation of the case on its merits.

Equity ought not to interfere, when adequate relief might have been had at law. Were the verdict improper, a new trial could have been granted by the Court of Law. This appears to be an application to a Court of Equity to grant a new trial, in a cause which had been tried in a Court of Law, that had ample power to grant full relief. Courts of Equity are not instituted to correct the errors, or revise the judgments of Courts of Law. (*Fentress* v. *Robins, N. C. Term Rep.* 177.) This is an attempt to obtain two trials, in different forums, of the same question; first taking a chance at Law, and

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then appealing to Equity. There must be some end to litigation. If injustice had been done the Plaintiff at law, he could have appealed, or have procured a *certiorari*, and had the judgment of the Court below revised, by a Court of superior jurisdiction, possessing common law powers, and constituted for the purpose of correcting such errors. (*Gatlin* v. *Kilpatrick*, 1 *Car. Law Repository*, 534.)

The act of the General Assembly, organizing a Court of supreme jurisdiction, was passed in 1799; and a Court possessing such powers, has been since continued. The Plaintiff could have had the alleged errors revised by an appeal to the common law side of this Court, without invoking the exercise of Chancery powers. Relief is not given in Equity, because there has been an omission to make defence at law. (14 *Ves.* 81—1 *Johns. Ch. Rep.* 51.)

But there has been no such omission. The defence was made in a Court of competent jurisdiction, and was overruled. This circumstance will not justify the interference of a Court of Equity. (2 *Johns. Rep. Ch.* 557.)

The Plaintiff alleges, that he seeks relief in this Court on the ground of newly discovered evidence; that he did not know, until after the trial at law, that the bond had been placed in *Nailing's* hands, only to indemnify him for his liability, as surety of the obligee, and was endorsed to him without any other consideration. It is to be inferred from this allegation, that the obligor knew, at the time he procured the receipt from the obligee, that *Nailing* held the bond. Ignorance of this fact is not pretended, and certainly the obligee not having possession of the bond, was sufficient to put the obligor on inquiry, and to prevent his paying it, until he could obtain its surrender. It is not intimated that the obligee concealed from the obligor, at the time of the alleged payment, that *Nailing* had possession of the bond; and it must be inferred from the circumstances, that the obligor well knew, or had very good reason to believe,

Nailing claimed some interest in the bond. Why then did the obligor make payment to the obligee? Were it with any design to defeat *Nailing's* claim, the Plaintiff, who represents the obligor, comes with ill grace into this Court. It is not alleged, that any artifices were resorted to, either by *Nailing*, or the obligee, to deceive the obligor. To view the transaction most charitably, it was an act of gross negligence, or extreme folly, on the part of the obligor, which gives him no claim to the interposition of this Court.

The Plaintiff sets forth no reason, why he could not have discovered this new matter, by the exercise of ordinary diligence, as well before, as after the trial at law. But the discovery of this evidence, and its exhibition on the trial, could have been no defence for the Plaintiff. The jury, by giving a verdict for the obligee, must have come to the conclusion, that payment had not been made, and that there had been no accord or satisfaction; which conclusion must have been founded on the belief, that the receipt was spurious, and not the act of the obligee. The Plaintiff could have gained nothing by showing, that the obligee had the beneficial, as well as the legal interest in the bond.

The endorsement of the bond to *Nailing*, was only the assignment of a *chose* in action, which vested in him no legal rights, and his interest would not be noticed in a Court of Law. The assignment was made in February, 1785. The act making bonds for the payment of money negotiable in this State, was not passed until December, 1786. A bond, not negotiable at the time of its execution, does not become so by subsequent occurrences. (1 *Hay. Rep.* 372, 398.) The act of 1786, had no retrospective operation; it did not embrace bonds made before its enaction. Suits on such bonds must be brought in the name of the obligee; the assignment could not clothe the assignee with any legal rights. (*Wilkinson* v. *Wright Conf. Rep.* 342.) Our Courts of Law only consider le-

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gal rights. (*Jones & Wife* v. *Blackledge*, 2 *Carolina Law Repos.* 457.)

The action was brought in the name of the obligee; the legal right was clearly in him. On the plea, that the bond had been paid at the day, or on the plea of accord and satisfaction, made and accepted by the obligee, the question could not arise in a Court of Law, whether the assignment had been made with or without consideration. If any question of fraud had incidentally arisen on the trial, that Court was competent to its decision.—It was not necessary to the defence of the Plaintiff, to show that the bond had been assigned without consideration. That Court would not inquire, who was beneficially interested in the suit, but would look only to the legal rights of the Plaintiff in the action. It is said, the Court protected the assignee, on the ground that the assignment was evidence of its having been made for valuable consideration. If the Court of Law, which tried the cause, inquired into the equitable rights of the assignee, and deemed such an inquiry material to the issues joined, it is believed to be a mistake, and it carried the Court "*out of the record.*" And such error gives the Plaintiff no title to the interference of a Court of Equity. He could have moved for a new trial, or he could have had the error corrected, by the adjudication of a Court of appellate jurisdiction, possessing common law powers. No Court aspires to infallibility, or claims exemption from error. Human institutions partake of human imperfection. Perfect justice is not to be expected from imperfect tribunals.

The bill must be dismissed; each party paying his own costs.

Hall, Judge.—I suppose it was competent for *Peace* to pray a discovery from *Nailing*, whether he had any interest in the obligation on which suit was brought. But that mode of defence having been resorted to, and

carding out frivolous, the bill ought to have been dismissed, and not held over as an original, as was too often permitted to be done by Courts of Equity at the time this was filed.

By holding the bill over and taking testimony, it was intended to examine a second time the same subject, which had been examined and disposed of in the Court of Law—to have a new trial—when the Plaintiff had no equitable matter in his bill, which entitled him to it. For that purpose testimony has been taken by both parties, and the suit has remained upon the docket twenty years. I have examined the testimony, not for the purpose of ascertaining whether the bill should be dismissed or not, (for I think it ought to be dismissed, independently of any testimony,) but to ascertain how the costs should be disposed of, and as far as I can discover, the merits of neither party entitle them to costs. Nothing but the endorsement on the note, and *Nailing's* answer, show that he had any interest in the note; indeed there is reason to believe the contrary. On the other hand, whether he had any real interest in the note or not, *Dickinson* knew that the note was assigned to him, before he paid the money to *Smith*.

For these reasons, I think neither party entitled to costs, but that each should pay their own. I suppose the suit's remaining on the docket so long, was owing to a common error.

PER CURIAM.—Let the bill be dismissed without costs.

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Ann Stallings et al.
v.
Isaac Stallings et al.
} From Johnston.

The second *proviso* to the third section of the act of 1806 (*Rev. c.* 701) respecting parol gifts of slaves, applies to the whole act, and is prospective in its operation.

By that *proviso*, parol gifts of slaves to children are validated by the death and intestacy of the parent, without resuming the possession, and become effectual from the time the slaves were delivered to the children.

Where slaves were delivered to a child, and remained in his possession until the death of the parent intestate, it was held to be an advancement at *the time* of the delivery, and the subsequent increase was not to be valued in making distribution of the parent's property, nor to be taken as an advancement to the child.

The case of *Davis* v. *Brooks* (3 *Murp.* 133) approved by Haywood, Chief-Justice.

This was a petition for an account of the personal estate, and a division of the negroes of one *Zadock Stallings*, who had died intestate.

A division of the latter had been made, under an order of the County Court, upon the principles mentioned in a case agreed, which was submitted to his Honor Judge STRANGE, on the last Spring Circuit, and which was as follows:

"The intestate *Zadock Stallings*, in his lifetime, put into possession of several of his children, the negroes mentioned in the schedules filed by them, and which have been taken into the account in the division of the negroes of which the intestate died possessed. That the said *Zadock* executed no deed or other written evidence of the transaction, upon his sending the said slaves to the houses of his said children; and that no express gift of the said slaves was made by the said *Zadock* to the said children, but that the said slaves were put into the possession of the said children, in the ordinary manner in which slaves are sent to the younger members of a family upon their settlement life. That the said *Zadock* never

resumed the possession of any of the said slaves, but that they remained in the possession of the said children until the death of the said *Zadock*. That during the possession of the said slaves by the said children, and before the death of the said *Zadock*, the said slaves increased in number and value, which increase had not been estimated in dividing the slaves of which the said *Zadock* died possessed, as an advancement made to the said children by the said *Zadock* in his lifetime."

Upon this case, his Honor pronounced judgment confirming the division made under the order of the County Court, from which the children who were not advanced, appealed to this Court.

Seawell & Gaston, for the Plaintiffs.—The act of 1806, provides "that when, the said slave or slaves shall remain in the possession of such child or children, *at the time* of the death of such person, (he or she dying intestate,) such slave, &c. shall be considered as an advancement to such child or children, and be regulated by the laws now in force relating to advancements made to children, by a parent *in his lifetime*."

The Judge who decided this case below, appeared to entertain no doubt upon the point, and in pronouncing his judgment stated, that the peculiar phraseology of the act placed the question beyond all difficulty. The particular clause in the act adverted to by his Honor, was the concluding part of it, which declares, that "such slave, &c. shall be considered as an advancement, &c. and be regulated by the laws now in force relating to advancements made to children by a parent in his *lifetime*."

With all becoming respect for this opinion, and with due deference to the reasons upon which it is grounded, we arrive at a directly contrary conclusion, from the phraseology of the same part of the act. It may well be questioned whether this section of the act is not retros-

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pective altogether. In the first place, it is perfectly clear, that no interest passes by the act of putting in possession—that was the very thing the act intended to prevent—it intended to abolish parol gifts. It is the possession of the child *at the death of the parent*, and the intestacy of the parent, which united, make it an advancement; not an advancement in the life of the parent, that could not be, for it is *by* his death that it becomes an advancement; and the words "regulated, by the laws relating to advancements made by a parent in his *lifetime*," are to declare that this advancement, made *after* his *death*, is like an advancement in his *lifetime*, to be brought into hotchpot. The property so put into the possession of the child, remains, during the life of the parent, the absolute estate of the parent—he can sell it, it is liable for his debts, he may bequeath it away, and it is to all intents and purposes his. The meaning of the Legislature is obvious, that the not making of a will by the intestate, under the circumstances of the possession, is to be regarded as having the effect of a legacy, but declaring that it should be brought into hotchpot. Now it is admitted, as a well established rule, that the value of the advancement is to be estimated at the time when it is made, because the child may then sell it, it gives him credit, and if it dies, or is destroyed, still being his property, he must account for it. When, then, did this property become an advancement, so as to enable the child to sell? The answer is, at the death of the intestate. Then the conclusion follows, its value at that time is to be estimated.

There is another ground upon which this point can be placed, which is decisive of the question. By this construction, perfect equality is attained; and if the matter is not clearly defined by the Legislature, so as to admit of no doubt, as the object in all instances of hotchpot, is equality, the Court will so construe it, as to effect this end. The reason why subsequent value, or increase, in the case of an

advancement during the life of the intestate, is not to be regarded, is, that by the gift, the property changes, and the increase afterwards accrues, when it is the property of the donee.

It must be perfectly clear, that under this act, slaves which died in possession of the child, after being put into such possession by the parent, are not to be regarded as advancement, because the possession did *not continue* until the parent's death intestate.

Badger, with whom was *Devereux, contra.*

HALL, Judge.—By the act of 1766, (*Rev. ch.* 79) which points out the method of distributing intestate's estates, it is amongst other things enacted, "that in case any child shall have any estate by settlement from the intestate, or shall be advanced by said intestate in his lifetime, by portions not equal to the shares, which shall be due to the other children, by such distributions as aforesaid; then so much of the surplus of the estate of such intestate is to be distributed to such child or children, as shall be advanced in the lifetime of the intestate, as shall make the estate of the said children to be equal, as near as can be estimated."

By the act of 1792, (*Rev. ch.* 364) it is declared, "that when any person shall die intestate, who had in his life time given to, or put in possession of any of his children any personal property, such child shall cause to be given to the administrator of such estate an inventory, on oath, setting forth therein, the particulars by him received of the intestate in his life time."

It appears to me, that the construction to be put upon the act of 1766 is, that advancements made by an intestate, ought to be valued at the time they were made, and not at the death of the intestate. But when the two acts are taken together, I think there can be no doubt but that this is the proper construction. The latter act ex-

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premly declares, that the child advanced shall give to the administrator, on oath, an inventory setting forth *the particulars by him or her received of the intestate in his lifetime.* It follows of course, as I think, that such particulars are to be considered the *advancements made*, and their value at the time, is to be regarded as *the amount of the advancements.*

The act of 1806, (*Rev. ch.* 701) was made for the purpose of preventing frauds and perjuries in contests, respecting slaves claimed from parents under parol gifts. And although it invalidated all parol gifts, made to children, so that they could not thereby acquire title to slaves, yet if the parent suffered the child to remain in possession of slaves thus given, during his lifetime and died intestate, the act declared, that such slaves should be considered as advancement, and should be regulated by the laws then in force, relating to advancements made to children by a parent in his lifetime. The law intended to give the parent a power over property thus situated, but if he did not think proper to exercise it, the property should then be considered as an advancement made, as if that act had never passed.

When a child has been thus possessed of slaves, and retains uninterrupted possession, until the parent's death, what view of the property, as an advancement, does the act refer us to? Not to its situation at the parent's death, but to the possession of the property, when first taken, and continue as an inchoate advancement, completed by the intestate's death. It could not be completed before, because the act gave the parent the power of reclaiming it.

Considering it as an advancement, can there be any doubt, but that the child must deliver an inventory to the administrator, as the act of 1792 prescribes, setting forth therein the particulars by him or her *received of the intestate, in his or her lifetime*; not the slaves that he holds at the intestate's death.

I admit that cases of hardship may be supposed, whatever general rule may be adopted; as where one child receives a young female slave; another a valuable male slave, who may be a tradesman. But this only proves, that general rules will not suit all individual cases.

There is certainly no hardship or injustice in the consideration, that an advancement in the hands of an older child shall increase from the time he receives it, until the parent's death, and that it should be valued at the time he received it; because at the parent's death such child may also have a family, and be somewhat advanced in years, and a younger child, to whom the same advancement may be made at the father's death, that was made to the older in his lifetime, may, when he arrives at the same age, have as great an increase in his advancement, as the older child has at that time. This is equality, and of course justice.

I therefore think that the advancements, should be valued at the time they are received, and not at the time of the intestate's death.

HENDERSON, Chief-Justice.—Two questions are made in this case. First, is the second proviso to the third section of the act of 1806 prospective, or is it confined to gifts theretofore made. If it is prospective, at what time shall the slaves be valued? At the time they were put into the possession of the child, or at the time of the parent's death? The first question was decided in the affirmative by this Court, in the case of *Davis* v. *Brooks* (3 *Murp.* 183). The last question has not heretofore arisen. Were we disposed to re-examine the first question, we see no reason to doubt the correctness of the decision in *Davis* v. *Brooks*. The proviso can only be confined to gifts theretofore made, by considering it to be a proviso confined to the third section, where it is placed, and not applicable to the first, or rather to the whole act, its spirit being contained in the first section.

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The proviso withdraws the case made in it from the operation of the rule created by the act itself, which case would have been within that rule, but for the proviso.—The rule prescribed in the third section of the act, relates to the time in which suits shall be brought on parol gifts of slaves, made before the passing of the act. The case made in this proviso could not have fallen within the operation of that rule, for that rule fixes the time within which those who are *out* of possession, shall bring their *actions*. The case made in the proviso is, where the claimant is in *possession*, and cannot bring an *action*. He therefore needs not the aid of the proviso to shield himself from the operation of the rule created by the third section, for it cannot reach him. Neither can the least reliance be placed on the phraseology of the proviso, thereby to confine it to past transactions. The legislature looked to the death of the parent, as a consummation of the transaction. The fact of placing the property in the possession of the child was only inceptive, looking to the death of the parent for its consummation. The expression "*shall have put*," was proper, to make the case intended to be embraced by the proviso, for the placing in possession, must necessarily have preceded the death of the parent. On the contrary, if the proviso is considered as withdrawing the case made by it from the operation of the first section, it is plain, sensible and intelligible. That section declares, that no gift thereafter to be made of any slave, shall be good, unless the same shall be in writing. The case made in the proviso is, a gift of a slave, and not in writing, which the Legislature declared should be good. That can only be effected, by withdrawing from the operation of the first section, the case supposed in the proviso. It is therefore a proviso to that section, which being entirely prospective, the proviso has of necessity the same character, and is prospective also. Most usually, to be sure, a proviso is to be taken as an exception to, or as belonging to the

section in which it is found. But this is not necessarily the case; where, from its nature, it cannot form an exception to the rule prescribed in the section of which it is placed, it must be referred to some other part of the act. It cannot be referred to that where it is placed in this case, for it there would lose its essential quality.—I have been induced to go at large into this question, from the zeal with which this point was pressed upon the Court, notwithstanding the case of *Davis* v. *Brooks*, and the general impression of the profession.

This case then presents the second question, above stated. It is the death of the parent intestate, which validates and makes good the gift. Without this requisite, the case would fall clearly within the first section of the act. With it, it stands confirmed, as if the act had never been passed. The act of putting the property into the possession of the child makes the gift, if it be not subsequently revoked—or (should the expression be prefered) if consummated by the parent's permitting the slave to remain with the child, and dying intestate, either wholly, or as to the particular slave. For should a will be made, and the property thus given not disposed of—that is, should the parent die intestate as to it, the case would be still within the proviso, so far as to make the gift good. For however we may be disposed to follow up the erroneous decisions of this Court on the question of advancements, and bringing into hotchpot, it is evident, that there is no such thing as bringing into hotchpot upon a partial intestacy. When I say there is no such thing, I mean *that there should* be no such thing. The principle upon which hotchpot is founded is against it; and however the cases may stand, no analogies can be drawn from them. It is not a gift at the death, but at the time the slave was placed in the possession of the child, and the circumstances stated in the proviso are evidence, in the estimation of the Legislature equal to that which is required

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to a valid gift by the first section. The Legislature has placed both cases on the same ground. Were it not so, what is to become of the issue of the slave born afterwards—no provision being made by the act as to that; it speaking only of the slaves placed in the possession of the child. The case so warmly pressed by the Plaintiffs Counsel, does not at all improve this construction; to wit, the withdrawal of the mother from the possession of the child. Its only effect would be, to prevent the operation of this proviso as to the mother; it would leave her issue to be affected by it. Neither is it correct to say, that the property must be valued at the time the gift was perfected. It should be valued as it was when the parent intended to pass the property. The change of possession has the character of a gift; but it wanted the evidence of intent, which the Legislature required by the first section, to make it valid, viz. a writing evidencing an intent to give. In the proviso, they substituted what they deemed equivalent to writing. The substitute did not consist of a single act, but of a series of acts. The property did not pass until all were completed. But when completed, it was a gift, and a gift from the commencement. For the transaction is entire; it cannot be divided. The first step is as necessary as the last; all the parts compose the whole. To make it a gift only from the death of the parent, would be to disregard one of the most essential qualities of a gift, the delivery of possession. In the opinion of the Legislature, the mischiefs intended to be prevented by the first section, the setting up of spurious gifts by perjury and misconception, would not arise in the case within the proviso. They therefore, not only withdrew that case from the operation of the act, but validated it, and made it a good gift. What was made a valid gift? The delivery of possession—the only part of the transaction, which, on its face, bore the character of a gift. The other circumstances are only evidences of that intent, and are in the nature of a

confirmation, which relates back, and validates the act confirmed.

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A contrary exposition would be attended with the most unjust consequences. Property is placed in the hands of two children, with one is placed a young woman, whose maintenance, with that of her issue, is a burden, far beyond the value of their services; with the other is placed a male slave in the prime of life. He is worn out entirely in the service of the child, and at the parent's death is worth nothing. If the property is to be valued as it is then, one child not only labors for the other, but for one who has already drawn largely from the stock on which he had no greater claim than the first. The elder children have also a claim to an advancement in the life-time of their parents, not generally adverted to, but equal to those of the younger. If a distribution of the whole of the parent's estate is postponed until his death, that is, takes place at the same time, the younger children receive equally with those whose claims have been long delayed, and which, to make them all equal, should have drawn something like interest or increase for the delay. The claims of children do not fall on the parent to the same amount at the same time, but at different times, in different amounts, according to their respective ages. The mode of valuing property, at the time the parent places it in the possession of a child, preserves this equality; the other destroys it. Upon the whole, I consider this as an advancement made when the slaves were placed with the children, and like all other advancements to be valued at that time, or when made.

Per Curiam.—Let the decree be affirmed.

MEMORANDA.

It is our melancholy duty to announce the death of the Honourable JOHN LOUIS TAYLOR, late Chief-Justice of the Supreme Court of North Carolina. The fatal disease, which in the course of a few days removed him from the embraces of his family, from a society which he adorned, and a country which he had long and faithfully served, found him at his post engaged in the discharge of the duties of his high office. He departed this life on the 29th of January, 1829, two days after the close of the last term of this Court.

In the character of this distinguished man there was such a rare union of qualities as renders the task of portraying it one of peculiar difficulty. No one property stood out in such bold relief, or disproportioned growth, as to afford to an ordinary artist, the certainty of seizing a likeness. The lineaments of his mind were delicate, and so harmoniously blended, as to present to the intellectual eye, an object on which it dwelt with serene and affectionate pleasure, conscious of excellence yet scarcely sensible in what it consisted.

The late Chief-Justice was descended of Irish parents, but was born in London, on the 1st March, 1769. At the age of twelve years, he was removed from his widowed mother, and brought over to this country under the charge of his elder brother, the late *James Taylor*, Esq. By the assistance of this kind relative, he obtained, though in an imperfect degree, the benefits of a classical education, at the College of William and Mary in Virginia. Compelled to leave College before his Academical career was completed, he came to North-Carolina, and after a short preparatory course of legal study, n which he had no preceptor nor guide, he was called to the bar at an unusually early age—before he had finished his twentieth year. The young stranger settled himself at Fayetteville, and there, without patronage or con-

June, 1829. nexions, soon gained the affections and attracted the confidence of those around him. His gentle, unobtrusive manners, a singular felicity of expression, which always seized, and apparently without effort, the most appropriate word for the communication of a thought, a playful but ever benevolent wit, united with quick perception, great ingenuity in argument, and a most retentive recollection of whatever he had read, opened for him at once the career of eminence, in which he advanced without faltering. His success excited no envy, for it was wholly unaccompanied by arrogance, and rendered but the more conspicuous the generosity of his temper, and the kindness of his heart. He was elected more than once to represent the town of Fayetteville in the General Assembly, and he actually occupied this station in the year 1796, immediately before his removal to Newbern. In 1798, he was appointed by the Legislature one of the Judges of the Superior Courts of Law and Equity, then the highest tribunals of justice in our State. In the year 1810, when the Legislature directed the Judges to appoint one of their own body to preside as Chief-Justice in the Supreme Court, he was unanimously selected for that high distinction; and in 1818, when the Supreme Court was newly organized, he was elected by the General Assembly one of its Judges, and by his associates re-appointed the Chief-Justice.

How he discharged his duties during the 20 years he administered justice on the circuit, it is impossible that the bar or the community can have forgotten. He was pre-eminently a safe Judge. It was difficult to present a question for his determination, upon which his reading had not stored up, and his retentive memory did not present some analogous case, in which it had been settled by the sages of the law. And with him it was a religious principle to abide by the landmarks, "*stare decisis.*" In his charges to Juries, he was full and perspicuous, and while he left unimpaired their dominion over the

question of fact, he never shunned responsibility by evading a distinct expression of opinion on every point of law. His patience was exemplary, and his courtesy universal. Uniting in an extraordinary degree suavity of manners with firmness of purpose; a heart tremblingly alive to every impulse of humanity, with a deep seated and reverential love of justice—the best feelings with an enlightened judgment—he made the law amiable in the sight of the people, inspired affection and respect for its institutions, and gained for its sentences a prompt and cheerful obedience. JUNE. 1829.

Of the mode in which he executed his functions as a Judge of the Supreme Court, the world can have few opportunities of judging, except from his reported Decisions; and to these we appeal, as furnishing no slight testimony of his merits. We presume not to set up ourselves as the most competent judges on such subjects; but we will not hesitate to express our belief, that while all may be read with profit and are entitled to respect, there are many—very many—which may be regarded as models of legal investigation and judicial eloquence. There is indeed a charm in all his compositions seldom to be found elsewhere, which has induced not a few to regret that the Chief-Justice had not devoted himself entirely to a literary life. He would probably have proved one of the most elegant writers of his day. He who could render legal truth attractive, could not fail to have recommended moral excellence in strains that would have found an echo in every heart.

Of the Chief-Justice, as a man, we are unwilling to trust ourselves to speak as we feel. We loved him too well and too long, to make the public the depository of our cherished affections. If there ever heaved a kinder heart in human bosom, it has not fallen to our lot to meet with it. If ever man was more faithful to friendship, more affectionate in his domestic relations, more free from guile, more disinterested, humane and charitable,

June, 1829. we have not been so fortunate as to know him.—When we think of these excellencies—when we call to mind the instances in which we have seen them illustrated in practice, and felt their kindly influence—and when we look around into the wide world to search for those who may supply his place in our affections, the exclamation arises involuntarily:

"Vale! Vale!
"Heu quanto minus est, cum reliquis versari,
"Quum tui meminisse!"

At a meeting of the Executive Council, held in Raleigh, on the 8th day of May last, JOHN D. TOOMER, Esq. was appointed a Judge of the Supreme Court *ad interim*, to supply the vacancy occasioned by the death of the late Chief-Justice, and took his seat the first day of this Term.

At a meeting of the Judges of the Supreme Court, held during this Term, LEONARD HENDERSON, Esq. was appointed Chief-Justice.

JUNE. 1829.

John Henderson and others
v.
Robert Wilson Executor of William Henderson, } From Mecklenburg.

Where a testator directed his land to be sold, and the proceeds applied to a purpose which failed, *held*, there being no evidence of an intent to convert the land out and out into money, that a trust resulted to the heir at law, notwithstanding a residuary clause bequeathing "any other thing not mentioned in this my last will."

The Master to whom the accounts of the Defendant were referred by an order made in this cause at December Term last, (*Ante* 276,) reported at this term that the sum of 7,440 dollars had been raised by a sale of the land devised by the testator to be sold. But whether this sum passed under the residuary clause of *William Henderson's* will, or to his heirs at law, or to his next of kin, was submitted for the decision of the Court. The following is a copy of those parts of the will which are considered important:

"I *William Henderson* being &c. being possessed of a considerable property both real and personal, and desirous of directing a disposal of the same after my death, do the 9th day of January, 1818, make and publish this my last will:

"That is to say, the tract of land that I now live on, lying on the Catawba River, containing three hundred acres, and also fisheries, it is my last will and pleasure, that my executors, hereafter to be named, do within six months after my decease, cause the aforesaid tract of land to be publicly sold to the highest bidder, after giving three months public notice, terms of sale to be one-third yearly until the amount is paid, the purchaser to give good and sufficient security, with mortgage on the premises. And my will is, that the money arising from said sale shall be disposed of as follows, that is to say, the money arising from the sale of said land shall be laid out in purchasing shares in the State Bank of North-Carolina, or in purchasing shares of the United States Bank, and the profits arising to go towards paying a minister of the gospel, who shall preach at the Seceding Meeting House called Gilead, in said County, being on the great road leading from Charlotte to Beattie's Ford, (the party called the Associate Seceding party.)

(Here follow several trifling legacies.)

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"The rest of my negroes, viz. *Betty*, *Jerry*, *Frank*, *Jim*, *Alek*, five in number, with all horses, cattle, hogs, sheep, farming utensils, household furniture, and any other thing not mentioned in this my last will, I direct my executors to sell at public sale, and the monies arising to be laid out in the manner following: first, all my just debts to be paid, and funeral expenses to be paid. I give and bequeath *Hugh Lucas* one dollar. Also give and bequeath to *John Henderson* one dollar (son of *William*). I also give and bequeath to *William H. Lucas* forty dollars. Then the remainder or balance to be divided equally among the following persons: I give and bequeath to my sister *Jane* and family, I give and bequeath to my brother *Archy's* son, *James Henderson*, I give and bequeath to my brother *James* and family, each one to share and share alike."

This question was argued at the last term by *Badger*, for the residuary legatees, and by *Devereux*, for the heirs and next of kin, who were the same persons.

The Court took time to advise, and this term their judgment was pronounced by

HALL, Judge.—The question to be decided is, who is entitled to the proceeds of the sale of the land devised to be sold by *John Henderson's* will, as the object for which the testator directed the sale cannot be accomplished.

Cox, in a note to *Cruse* v. *Barley*, (3 *P. Wms.* 22.)—*Bridgman*, in his index, (*Devise* 3 *pl.* 151,) and *Thomas* (in a note to his edition of *Co. Litt.* 2 *vol. page* 702,) unite in saying, that when real estate is devised to be sold, it is important to consider, whether the testator meant to give the produce of such estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will. For unless the testator has sufficiently declared his intention, not only that the realty should be converted into personalty, but further that the produce of the real estate shall be taken as personalty, whether such purpose take effect or not, so much of the real estate or the produce thereof, as is not effectually disposed of by the will at the testator's death, whether from the silence or inefficacy of the will itself, or from subsequent lapse, will result to the heir. The

rule as thus laid down, seems to be supported by the following authorities, which are referred to for that purpose: *Randal* v. *Bookey*, (2 *Vern.* 425)—*Stonehouse* v. *Evelyn*, (3 *P. Wms.* 253)—*Fletcher* v. *Ashburner*, (1 *Brown ch.* 502)—*Robinson* v. *Taylor*, (2 *Do.* 589)—*Stansfield* v. *Habergham*, (10 *Ves.* 279)—*Williams* v. *Coade*, (10 *Ves.* 500)—*Gibbs* v. *Ougier*, (12 *Ves.* 415)—*Hooper* v. *Goodwin*, (18 *Ves.* 156)—*Chambers* v. *Brailsford*, (18 *Ves.* 368)—*Gibbs* v. *Rumsey*, (2 *Ves. & Bea.* 294)—*Chitty* v. *Parker*, (2 *Ves. Jr.* 271.)

It may therefore be taken for granted, that as the devise of the lands cannot take effect under the first clause in the will, the heirs at law are entitled to the proceeds of the sale of such lands, unless some other clause in the will gives it another direction. Viewing the question under the first clause of the will, it is the common case of a disposition by will of money to be raised from the sale of land, which money has been raised, but the devise cannot be carried into effect, and the money remains not further disposed of, and no doubt can exist that a trust results to the heir at law. It can make no difference that the land has been sold, and that *money*, the proceeds of the sale, is the subject of dispute. (*Hill* v. *Cock*, 1 *Ves. & Beam.* 174.) It is however contended, that the testator has made a disposition of it in other parts of the will, which it is next proper to examine.—The only part of the will which it can be supposed has that effect, is where he directs his five negroes, with all his horses, cattle, sheep, hogs, farming utensils, household furniture, and *any other thing not mentioned in this my last will*, to be sold at public sale, and the money arising therefrom to be applied to the payment of debts, funeral expenses, and after giving some legacies, he directs *the remainder or balance to be divided* as follows: "I give and bequeath to my sister *Jane* and family, I give and bequeath to my brother *Archy's* son, *James Henderson*, I give and bequeath to my brother *James* and family, each one to share and share alike."

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From this disposition it does not appear, that the testator intended to give to the produce of the land the quality of personalty to all intents, or to convert it out and out, (for in that particular he is altogether silent,) but only intends to convert it, so far as was necessary to answer the express purpose, for which a sale was directed. I say on that subject he is silent; because it does not appear to me, that the land or money in dispute is included, or was intended to be included in the residuary clause in the will last mentioned. The words (as far as concerns this question) are, "*and any other thing not mentioned in this my last will.*" He had directed his negroes, horses, furniture, &c. to be sold, and used these words to embrace any other articles of a like kind, that he might have omitted to mention. The residuum thus created is a special residuum of the *personal estate.* Of course the land or money in dispute is not included, not having been converted out and out, and therefore results to the heirs at law, as personal estate similarly situated would result to the next of kin, (10 *Ves.* 500—15 *Ves.* 416.) If it has not been converted into personalty, it would not pass in a residuary clause, intended to include the residuum of personal estate. (11 *Ves.* 90, see also *Gibbs* v. *Rumsey*, 2 *Ves. & Bea.* 296—1 *Ves. & Bea.* 416.) And it seems to be the opinion of the Master of the Rolls in *Dawson* v. *Clark*, (15 *Ves.* 414,) that a lapsed devise would not go to a residuary devisee, although a lapsed legacy would go to a residuary legatee, nor would it without the aid of our acts of Assembly, be subjected to simple contract debts. (*Gibbs* v. *Ougier.*) In *Collins* v. *Wakeman*, (2 *Ves. Jr.* 683,) money raised from the sale of real estate was expressly declared to be personal property. Yet as it was eventually undisposed of, it was held to result to the heir at law. (*Hooper* v. *Goodwin.*) So in *Sheddon* v. *Goodrich*, (8 *Ves.* 481,) it was held that money raised from the sale of real estate, not converted out and out into personalty, will not pass by a codicil, not attested so as to pass real estate.

There are cases however where residuary legatees have prevailed against heirs at law, as in *Mallabar* v. *Mallabar*, (*Ca. Temp. Talbot* 79,) and *Durour* v. *Matteux*, (1 *Ves.* 320,) and in those cases the Court was of opinion that the real estate was converted into personalty for all the purposes of the will, so as to be included in the residuary clause. So in the case of *Kennell* v. *Abbot*, (4 *Ves.* 802,) part of the money arising from the sale of copyhold estate was disposed of in legacies, the residue was expressly given in a general residuary clause; it was held that a void legacy, to be paid out of the same fund, passed by the residuary clause, that it was turned into personalty, and converted out and out.

Also in *Brown* v. *Bigg*, (7 *Ves.* 280,) where money arising from the sale of lands was directed to be laid out on security, and in a residuary clause, the testator gave after the death of his wife, the whole of his personal estate of every kind, both on *public and private security*, not disposed of in legacies, it was held to pass under such residuary clause.

But *Bridgman* (*Devise pl.* 151,) says that these cases do not decide the question which would have arisen, if there had been no residuary disposition, or if such residuary disposition had been confined to *what was personalty at the testator's death*. According to that distinction, I think the heirs at law entitled in this case, for the residuary bequest was certainly confined to what was personalty at the testator's death. The land was to be sold after giving three months notice, and the proceeds of the sale to be paid in three annual instalments. The other property, he directs to be sold at no particular time, or upon no particular credit, and it is the unappropriated part of the proceeds of that sale, which in this case constitutes the residuum. "The remainder or balance to be divided amongst the following persons;" the remainder or balance of what? The personal property before directed to be sold. He certainly never

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contemplated selling the money arising from the sale of the land. That money constitutes no part of the residuum. That was made up of the negroes and other property directed to be sold.

The heirs at law are therefore entitled to the money for which the land was sold, as the appropriation made of it by the testator cannot take effect.

PER CURIAM.—Decree accordingly.

James G. Stanly
v.
Lewis Stocks, Wright C. Stanly, and Samuel Street,
} From Craven.

Where lands conveyed in mortgage were sold by the mortgagor in separate parcels, the first vendee has no equity to marshall the whole mortgage debt upon a second—the latter having no notice of the purchase of the first.

If the second vendee had notice of the purchase of the first, would that fact alter the rule. Qu?

But where the first vendee paid his purchase money in extinguishment of the mortgage, and the second did not, *Held* upon an adjustment of the loss between them, that the payment of the first was to be estimated in his favor.

This was an appeal from a decree made by his honor Judge MARTIN, on the Fall Circuit of 1828.

The facts ascertained by his Honor, and set forth in the decree were, that the Defendant *Stocks* being indebted to the Plaintiff in the sum of 1,280 dollars, by deed dated the 6th of March, 1824, mortgaged to him a tract of land in Craven County—that the Defendant *Wright C. Stanly* on the 3d of May, 1824, purchased a part of the mortgaged premises from the Defendant *Stocks*, and on that day received a deed for it with covenants of seisin, warranty and quiet enjoyment, and paid the purchase money to the Plaintiff—that the Defendant *Street* on the 8th of December, 1824, purchased of the Defendant *Stocks*

the residue of the mortgaged premises, and on that day received a deed therefor, with covenants of seisin, warranty and quiet enjoyment, and paid the purchase money to the Defendant *Stocks*—that there was due upon the debt secured by the mortgage to the Plaintiff, the sum of $244 50 with interest. "It was therefore ordered, adjudged and decreed, that the Defendant *Street* within forty days pay to the Plaintiff the said sum of $244 50 with the interest thereon, and in default of such payment, that the Clerk and Master sell the lands mentioned in the answer of the Defendant *Street*, and apply the proceeds thereof to the payment of the said sum of $244 50, and in case the proceeds of the said sale should not amount to a sum sufficient to pay the said debt, then that the said Clerk and Master sell the lands mentioned in the answer of the Defendant *Wright C. Stanly*, and apply the proceeds thereof to the satisfaction of the said mortgage, after deducting therefrom the proceeds of the land mentioned in the answer of the Defendant *Street*."

From this decree, the Defendant *Street* appealed to this Court.

Gaston, for the Appellant, contended warmly that the Defendant *Stanly* had no right to an indemnity at the expense of *Street*—that there was no proof of notice to the latter of *Stanly's* right, and that the claim not being to a specific piece of property, but being merely personal on the Defendant *Stocks*, the maxim *qui prior est tempore potior est jure*, did not apply. He denied that the cases of *Gill* v. *Lyon*, and *Clowes* v. *Dickinson*, (1 *John. Chan. Rep.* 447, *and* 5 *Do.* 235) were applicable, and insisted that it was a case of contribution between the Defendants, and that both should discharge the incumbrance in proportion to the value of their respective purchases. He cited 5 *Viner ab.* 562—1 *Eq. ca. ab.* 113—*Bacon's Maxims*, 15—*Cary's Rep.* 3, *Do.* 159—*Fitz. N. B.* 235 *b.*—3 *Dyer* 316 *b* & 332 *a.*—*Herbert's case*, (3 *Rep.* 13 *a.*) and *Webber* v. *Smith*, (2 *Vernon* 103).

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Devereux, for the Defendant *Stanly*, cited the cases of *Gill* v. *Lyon*, and *Clowes* v. *Dickinson*, and contended that they were exactly in point. That the equity existing in favor of the Defendant *Stanly* against the Defendant *Stocks* was specific, and bound the land—he denied the necessity of notice to *Street*, as he held only an equity, and cited to this point *Jones* v. *Zollicoffer*, (*N. C. Term Rep.* 225) and insisted that the oldest equity was the best. He urged that *W. C. Stanly* could have marshalled the Plaintiff upon that part of the land purchased by *Street*, had it continued in the possession of *Stocks*, and that *Street* could have no better title than his assignor had.

Upon the authority of *Harris* v. *Ingledew*, (3 *P. W.* 98) and *Cheeseborough* v. *Millard*, (1 *John. Ch. Rep.* 409) he contended that the Defendant *Stanly* had an equity against *Street*, because the land purchased by the former had already paid a portion of the mortgage debt.

Henderson, Chief-Justice.—It is neither alleged, admitted, nor proved, that when *Street* purchased from *Stocks*, he had notice of *Wright C. Stanly's* prior purchase from him. But it is insisted on behalf of *Stanly*, that notice is entirely unimportant; that it is so, only where one party has the legal, and the other the equitable interest. That the doctrines founded upon it have no application where both parties have an interest of the same kind, to-wit, both legal or both equitable; in such cases priority of acquisition is the rule by which the respective rights of conflicting claimants is determined. For this is cited the case of *Jones* v. *Zollicoffer* so often in this Court. It it true, that where two persons claim the *same thing*, both under a legal, or both under an equitable title, there priority of acquisition alone is regarded, and notice is unimportant. Notice is only important where one claims the legal, and the other the equitable estate. In this case, the parties do not claim the same thing; one claims one part of the

land, and the other another part. The equity of *Wright C.* *Stanly* is, that *Stocks* should disencumber his lands from the mortgage, and that as between him and *Stocks*, the whole mortgage debt should be thrown on the residue of the mortgage lands retained by *Stocks*. This equity is I think personal to *Stocks*, and is not in the nature of a lien on the lands. To affect *Street* with it, he must when he purchased, have had notice of the obligation imposed on *Stocks*, for there was no such incumbrance on the land, as to affect it in the hands of a *bona fide* purchaser without notice. Had there been notice, I forbear to say what would have been its effects in this case.

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But I think *Stanly* has another equity, which the case presents. It appears, that he paid the purchase money of that part of the mortgaged premises purchased by him, to the mortgagee. This was a payment by the land, and as in equity the land is the debtor, it discharged the lien *pro tanto*, from that part which paid it, as to the holders of the other part; and gave the purchaser a right to call upon the mortgagee for all his facilities of enforcing payment out of the other lands, if he, the mortgagee, should levy the balance out of the land thus purchased. For between several purchasers of the mortgaged lands, each one has a right against the others, of compelling every part to bear its burden. *Wright C. Stanly's* purchase has already borne part of the burden. The Master will estimate what each part is to pay, according to these principles, taking as his guide the report made by the Master of Craven County, as to the amount due, value of each part of the mortgaged lands, and the sum paid by *Wright C. Stanly*.

PER CURIAM.—Decree accordingly.*

* It is proper to say that the case in the Court below was decided upon an admission of notice to *Street*—the Reporter was Counsel in that Court, and in drafting the decree conceived, erroneously, that the fact was of no importance, and neglected to insert it.

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James H. Smith, adm'r.
v.
John Washington & David Thomson, } From Johnston.

A conveyance of a *chose in action* in trust to pay a debt, is within the act of 1820, (*Revisal ch.* 1037,) and unless registered within six months of its date, is void against a subsequent *bona fide* assignee without notice.

The bill charged that the Plaintiff's intestate being surety for one *Robert H. Helme* to a large amount, and *Helme* being anxious to indemnify him, conveyed to the Plaintiff, in trust for the intestate, by deed dated November 17th, 1825, a decree for a sum of money which he, *Helme*, had obtained against the firm of *John Williams and Company*, of which he was a member. The deed was filed as an exhibit and appeared to have been proved on the 25th of August, 1826, and recorded the 2d of September following.

The Defendants claimed under an assignment of the same decree made by *Helme* to them, junior in point of date, but proved and recorded within six months of its execution, and denied notice of the prior assignment to the Plaintiff.

The only question discussed was, whether the conveyance of a *chose* in action, in trust to secure a debt, was a conveyance which the act of 1820 required to be proved and registered within six months after its execution.

Badger & Devereux, for the Plaintiff.

Seawell & Gaston, for the Defendant.

HALL, Judge.—The object in registering mortgages and deeds of trust is, to guard against fraud and deception, by giving notice of the real situation of the debtor to all who may be interested in knowing it. To that end the Legislature have declared, that no mortgage or deed in trust for any estate, whether *real or personal*,

shall be good against creditors or purchasers, unless proved and registered within six months. (*Act of* 1820, *Revisal ch.* 1037.)

The obvious intent of the act, so far as creditors and purchasers are concerned, is to give publicity to conveyances which transfer the title of property to others, when the debtor retains the possession of it, and uses it as his own. It is true, generally speaking, that there cannot be such a possession of *choses* in action, when separated from the right, as would be so likely to deceive third persons. But it is in suppression of the mischief, and in furtherance of the remedy, to require that mortgages and deeds of trust of *choses* in action, should also be registered. *Choses* in action are rights which may give a credit to the person in whom they are vested, and a transfer of them *in secret*, contrary to the reputed right, might readily tend to fraud and deception. *Choses* in action, judgments, debts, &c. are certainly included in the term *personal estate*. And that they come within the mischief intended to be remedied, is proved by the present controversy. *Blackstone*, (*vol.* 2, 398,) divides personal property into that which is in possession and that which is in action.

From the premises, I must conclude that the debt due from *John Williams & Co.* to *Helme*, evidenced, the bill states, by a decree, is personal estate, and that a conveyance of it in trust must be registered according to the act of Assembly, herein before recited.

PER CURIAM.—Dismiss the bill with costs.

June 1829.

David J. White & Ann J. Colvin
v.
William H. Beattie, ex'r of Ann J. White, } From New-Hanover.

Specific legacies do not abate upon a deficiency of assets, unless all the property of the testator be specifically bequeathed.

But where the testator does not give away the whole of his property specifically, and what is left, is afterwards consumed or destroyed by the testator or his executor, this circumstance will not make the specific legacies abate.

It seems that to determine whether a specific legacy shall abate or not, evidence of the state of the assets *dehors* the will, may be received.

The case of *White* v. *Beattie*, (*ante* 87,) overruled upon a rehearing, as to the abatement of the specific legacies.

This cause was heard again at the present term, upon the petition of the Defendant to set aside the interlocutory order, made at December Term 1827, and reported ante page 87. It is proper to explain an apparent difference between the statement of that case, and the opinion of the Chief-Justice, in respect to the accounts of the Defendant. Estimating debts alone, the Defendant was in arrears—but adding to the amount of debts the expenses incurred by the Defendant in erecting a wall round the grave-yard, and placing a tomb-stone over the testatrix and her mother, he was in advance.

Badger argued for the Petitioner. No Counsel appeared for the Plaintiff.

HENDERSON, Chief-Justice.—The general rule is, that specific legacies do not abate, in favor of either general or pecuniary legacies. But as this maxim is founded on the presumed intent of the testator, that they should not abate, they are made to do so, when the testator directs that they shall. He is presumed to give that direction, or so to intend, when he gives away the whole of his estate in specific legacies, and then gives a pecuniary legacy. For how otherwise is the pecuniary legacy to be

paid. But where the testator does not give away his whole personal estate in specific legacies, if what is left is afterwards lost, destroyed or used by the testator, or is wasted or consumed by the executor, in payment of debts or otherwise, such supervenient circumstances will not alter the construction of the will. For it is a question of intent at the time of making the will. We must collect the intent, so far as regards the present question, by applying the words of the will to the then existing circumstances, and it is not to be affected by the changes which time and chance may have produced.—Otherwise the intent would be changeable and fluctuating, not fixed and uniform; one intent to-day, another to-morrow.

This case does not render it necessary to discuss the question, whether it must be collected from the face of the will, that all the property is exhausted in specific legacies; or whether the fact may be proved by evidence *dehors* the will. For it does not appear in this case, what was the state of the funds when the will was made. I presume however, that it would impugn no rule of law or evidence, to prove the fact by extrinsic testimony. It appears, that the testatrix had other property at her death, besides what she specifically bequeathed.

I cannot perceive on what grounds the decree heretofore made can be supported. The case of *Sayer* v. *Sayer*, (*Prec. Chan.* 393,) on which it was professedly founded, does not support it. The truth is, that when the case was before us heretofore, the facts were strangely misconceived.

PER CURIAM.—Let the bill be dismissed with costs.

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Thomas C. Dunn
v.
John Holloway, Robt. Cannon et al. } From Montgomery.

Upon the construction given to the act of 1788, (*Rev. ch.* 284) for avoiding securities given upon a gambling consideration, money lost and paid cannot, at law, be recovered back.

Therefore equity will not interpose to restrain the collection of a judgment, obtained on a bond void under that statute, unless it was obtained by a fraudulent circumvention of the Defendant at law.

The bill charged that the Plaintiff being a young and inexperienced man, had been induced to play at cards with the Defendants, who, by means of a combination between themselves, had won a large sum from him—that nearly all of the winnings of the Defendants had, by an arrangement between themselves, been thrown into the hands of the Defendants *Holloway* and *Cannon*, to whom several bonds, executed by the Plaintiff for the money thus won, had been assigned—that suits had been instituted and judgments rendered on these bonds. The prayer of the bill was for a discovery and an injunction.

The Defendants all denied any combination to win money of the Plaintiff—but admitted that the bonds mentioned in the bill, had been given to secure money won at play. The Defendants *Holloway* and *Cannon*, admitted that they had won very small sums of the Plaintiff, and that they had purchased bonds executed by the Plaintiff, which they knew were given for money won at play, and that these bonds in some instances, had been incorporated with others, and were the same upon which the judgments had been rendered.

Copies of the records in the actions at law, were filed as exhibits to the answers, from which it appeared that the only pleas entered were those of Payment and a Set off.

At the hearing, his honor Judge DANIEL perpetuated the injunction except as to one judgment which was founded

on a note assigned to the Defendant *Holloway*, & which was purchased by him at the request of the Plaintiff. Upon this judgment, his Honor also perpetuated the injunction as to the discount made by *Holloway*.

From this decree the Defendants *Holloway* and *Cannon* appealed.

The case was fully argued by *Gaston & Ruffin*, for the Appellants, and by *Badger* for the Plaintiff. The Reporter regrets his inability to give an abstract of it, as during a considerable part of the trial he was unable to attend in Court.

HALL, Judge.—If such a construction had, or could have been given to the act of 1788, (*Rev. ch.* 284) made for the suppression of gaming, that no title would have accrued to money or property won at any game, whether the same was delivered and paid or not, I think the ruinous effects of gaming would have been more radically prevented. If money won and paid could be recovered back, a successful gamester would hold it by too doubtful a tenure to risk as much to get possession of it, as he would, when he knows that possession makes it his own. Considerations of this sort however, belong to the Legislature, because judicial decisions have given the act a different construction. The law may be taken as settled, that money won and paid, cannot be recovered back.

The case before the Court is not one, in which a Court of Equity is called upon to cause bonds to be delivered up, which were given upon a gaming consideration, but to enjoin the Defendants from further proceedings upon judgments obtained at law, upon bonds admitted to have been thus given, when no resistance was made at law to prevent the judgments from being obtained.

If the judgments were paid off, it would be the common case of money paid on a gambling consideration, which could not either at law or in equity, be recovered back.

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At law, the rights of the Defendants under the judgments are perfect. They can take out executions, and possess themselves of the money through the ministerial agency of the Sheriff. Possession of the money may make them more secure in the enjoyment of it, but it gives them no better right to it than the judgments do; therefore a Court of Equity will not sooner interfere, where judgment has been obtained upon a bond given upon a gaming consideration, where no attempt has been made to prevent it, than it will where money has been won and paid over.

There is much complaint of fraud and circumvention in the bill, and did it appear that the judgments were obtained through the instrumentality of these means, a ground might be furnished on which to support the injunction. But that does not appear to be the case. They were obtained *not* against Plaintiff's consent. His opposition has arisen since; but I think it cannot avail him, nor prevent a dismission of his bill.

PER CURIAM.—Let the bill be dismissed.

Henry Cook
v.
Mildred Streator et al. } From Wake.

Where letters of administration upon the estate of a deceased debtor never have issued, and after more than seven years from the death of the intestate, assets come to his heirs—it was held, upon a bill filed by a creditor setting forth these facts, and praying to have his debt paid out of the assets lately come to the possession of the heirs, that the act of 1715, (*Rev. ch.* 10) was a bar to the debt.

The Plaintiff in his bill, whichwas filed in September, 1826, alleged that *John Streator* was indebted to him, and on the 26th of April, 1806, executed a bond to secure the debt, payable on the 1st June thereafter—that soon after the execution of the bond, *Streator* died insolvent

and intestate, that letters of administration upon the estate had never issued—but that at the time of his death, a suit in the Court of Equity was pending by which the said *Streator* sought to redeem a valuable tract of land which he claimed to have been really conveyed in mortgage, although the deed was absolute upon its face—that the Defendants were the heirs at law of *Streator*, and had carried on the suit upon his death, and within a few months past, had obtained a decree for redemption, and for the rents and profits, which amount to a large sum, (vide the case reported, 3 *Hawks* 433). The prayer was, that the Plaintiff might have satisfaction of his debt from the fund thus recovered by the Defendants.

The Defendants in their answers, relied upon the act of 1715, (*Rev. ch.* 10,) entitled "an act concerning proving wills and granting letters of administration, and to prevent frauds in the management of intestates estates."

The case was submitted by *Seawell & Badger*, for the Plaintiff.

W. H. Haywood, for the Defendants, argued that if administration had been taken out by the Defendants the day before the bill was filed, and the Plaintiff then have sued at law, he would according to the clear construction of the statute, have been barred. For this was cited *Ridley* v. *Thorpe*, (2 *Hay.* 343,)—*Hollowell* v. *Pope*, (2 *Mur.* 108,)—*Hamilton* v. *Smith*, (3 *Do.* 115,)—*Bell* v. *Beeman*, (*Do.* 275,)—*Jones* v. *Brodie*, (*Do.* 594,) and *McIntyre* v. *Carson*, (2 *Hawks* 544.)

HALL, Judge.—In this case the Defendants have pleaded the act of 1715, which declares, that creditors of any person deceased shall make their claim within seven years after the death of such debtor; otherwise such creditor shall be forever barred. The Plaintiff charges that *John Streator* died insolvent, and that letters of administration on his estate have never been granted to any person.

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With respect to his insolvency, it appears that a suit was pending against *Jones* at his death, in which he had an interest. A recovery has been effected by his representatives since his death, so that it does not appear that he did die insolvent.

With respect to the other objection that no person administered upon his estate, it may be observed that no person has yet administered, and the Plaintiff had as much right to sue within seven years after his death, as he had when he brought this suit. He might have administered upon *Streator's* estate himself, and in that character might have filed a petition against the heirs at law under the act of 1789, (*Rev. ch.* 311,) provided there was no personal estate. As there was no obstacle to bringing suit within seven years more than exists at this time, and no suit was brought before the present one, I think the act before recited is a bar to it.

Per Curiam.—Let the bill be dismissed with costs.

John Barnes
v.
Turner Dickinson. } From Wayne.

Whether a bill to review a decree of the Court can be filed in a Court below. Qu?

A bill of review for newly discovered testimony cannot be sustained, if the discovery was made in time to have been brought forward in either a re-amended or supplemental bill.

It is an error to say that an injunction is of course waived by an amendment. But an injunction is never propped by an amendment.

This was a bill of review for matter of fact, filed in the Court below. The cause sought to be reviewed was decided in this Court, and is reported *ante* 273.

The bill charged, that since the trial at law, between the same parties, (*Law cases*, 1 *vol.* 346,) the Plaintiff

had discovered that the witness *Rebecca Hicks* had been bribed by the Defendant, and had on that trial been guilty of perjury. The Plaintiff then averred that he did not discover the fact abovementioned "until after the filing of the said original bill," and at the return Court of said bill, his Counsel moved to amend the same so as to charge the said newly discovered matter, when the Court decided that an amendment to said bill could not be granted, and the injunction retained. The prayer of the bill was, that the injunction might be continued, and for general relief.

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On the last Circuit, his honor Judge NORWOOD, on the motion of the Defendant, dismissed the bill for want of jurisdiction, it being a bill to review a decree of the Supreme Court. From this decree the Plaintiff appealed.

The cause was submitted without argument, by *Gaston*, for the Plaintiff, and by *Badger & W. H. Haywood*, for the Defendant.

HENDERSON, Chief-Justice.—This is a bill of review for error in fact in a former decree, made in this Court. Waiving every other objection, I think that the bill cannot be sustained, because it appears in the bill itself, that the error, or rather the cause of complaint, was known to the Plaintiff, at the return term of the original bill, time enough for him to have availed himself of it in that suit. For if the bill did not embrace it, it might have been amended; or if that could not have been done, it might have been brought before the Court by supplemental bill. The necessity, under which the Plaintiff says he was placed, of abandoning his injunction, if he amended his bill, (if in fact it did exist,) would have been obviated by a supplemental bill, leaving the injunction to be sustained, if it could by the original. I fear that the common idea, that an injunction is given up by an amendment, is carried too far; it is going sufficiently far to

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say, that an injunction cannot be sustained or propped by an amendment.

PER CURIAM.—Let the decree of the Court below be affirmed.

Mary J. Hester et al.
v.
James Hester & Samuel Young, ex'rs. of John Hester,
} From Granville.

When no rule for the management of a trust estate is prescribed by the creator of it, the law enjoins good faith, by which is meant honesty and diligence carefully applied—and a departure from the rule prescribed by the creator, or a failure in good faith, is a breach of trust for which a trustee is liable.

Where a testator directed his debts to be collected, and a tract of land to be sold; and with the fund thus created, a residence for his family to be purchased—but the executors purchased to an amount exceeding the fund, and in the exercise of good faith, refused an advantageous offer for the land—It was held, that they had been guilty of a breach of trust only in exceeding the amount of the trust fund, and the purchase being divisible, they were decreed to hold the excess on their own account.

From the pleadings, proofs, and exhibits the case was, that *John Hester* died having made a will, and appointed the Defendants his executors, having devised all his property as follows, viz. "I wish my tract of land in Granville sold, and out of the proceeds of the sale, together with the money due me, I wish my executors to purchase a piece of land somewhere most agreeable to my wife *Mary J. Hester*, for her and my children to live on, the balance of my property I lend to my wife during her natural life to raise and school my children on," after which in the event of his widow's marriage, he directed all his estate both real and personal, to be divided among his widow and children. At the death of the testator, his nett personal estate, exclusive of his negroes, amounted to 1,484 dollars, which together with the sum to

be realized by a sale of the land, constituted the fund appropriated by the testator for the purchase of a tract of land, for the residence of his family. Before a sale of the Granville land had been effected, the Defendants influenced by the urgent requests of the widow, and against their own judgments, purchased a tract of land for which they gave 3,000 dollars, executing their own bonds to secure the excess of the purchase-money over the fund in their hands. After this they made what they thought an advantageous sale of the Granville tract for 1,000 dollars, but the widow of their testator being extremely dissatisfied with the price, they upon her remonstrances, vacated the bargain.

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The Plaintiffs were the widow and children of the testator, all of whom were infants, the former having become dissatisfied with the purchase made by Defendants. The prayer of the bill was, that they might be compelled to take it upon their own account, and to purchase another tract more suitable to the wishes of the Plaintiff *Mary*, and that they might be charged with the $1,000, which they had refused for the land.

By an interlocutory order, the land devised by the testator had been sold, and produced the sum of $400.

The case was argued at June Term, 1827, by *Devereux*, for the Plaintiffs, and by *Badger & W. H. Haywood*, for the Defendant. At this term it was again argued by

Hillman, for the Plaintiffs.—As the proceeds of the sale of the tract of land directed to be sold, and the money due, constituted the only fund out of which they were authorised to purchase and pay for the land directed to be bought, it follows of course, that they ought to have lost no time in making the sale, and ascertaining the nett amount of debts due, in order that they might know what amount they would be justified in contracting to give, for the piece of land which they were directed to

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purchase. It appears however from the answer, that soon after the death of the testator, and before they had sold the tract of land which he owned, they contracted for the purchase of a tract of land for the sum of $3,000, which they were aware was an imprudent purchase, and exceeded in amount what they were authorized to give; but they allege as an excuse, that they made it at the earnest request of the widow. This excuse cannot avail the Defendants. The will directs that the widow should be consulted as to the place *where*, not as to the quantity of land, or the price to be given for the piece of land directed to be purchased. In this they were expressly limited to the fund before mentioned—and when it is recollected that she is but one of the parties interested, her consent will have but little weight. The infant devisees and the other complainants, who were not consulted, have certainly a right to a fair execution of the trusts of the will. The widow was intended by the testator to be a trustee of the land to be purchased, for the purpose of *raising* and *schooling the children*. Her interest was so blended with theirs, that it cannot be distinguished. She had no right to consent to any thing that would lessen the fund, or impair her means of accomplishing the benevolent objects of the testator.

The answer admits, and the proofs abundantly show, that the Defendants were offered $1,000 for the tract of land directed to be sold. Here again the excuse for *not selling* is, that the widow objected to the price. The answer to this is, that the executors thought the price a fair one, and that the testator knowing her weakness and want of skill and judgment in these matters, thought proper to confide the management of his estate not to *his wife* but to *them*. It is conceived however, that the motives of the executors have nothing to do with the case. The will directs *that that tract of land* be sold, and leaves *no discretion* in them. They were therefore bound to sell; and I take it to be well settled law, that if they

have failed to do so, and any loss has been occasioned thereby, they are bound to make good the loss. *Caffrey v. Darby*, (6 *Vesey Jr.* 488,)—*Ld. Montfort* v. *Ld. Cadogan*, (17 *Do.* 485, *S. C.* 2 *Merivale* 2)—*Massey* v. *Banner*, (1 *Jac. and Walk.* 241,)—*Langston* v. *Olivant*, (*Coop.* 33)—*Adye* v. *Feuilleteau*, (1 *Cox* 24,)—*Holmes* v. *Bring*, (2 *Do.* 1,)—*Scurfield* v. *Hawes*, (3 *Bro. C. C.* 90) *Saddler* v. *Hobbs*, (2 *Do.* 114,)—*Adair* v. *Shaw*, (1 *Scho. and Lef.* 243.)

The Defendants contend, that they are entitled to be indemnified for their advances from the other property of their testator, but I suppose it cannot be necessary *in this Court* to cite authority to show, that where a power is given by a will, the exercise of which is expressly limited to a particular fund, the executors cannot exceed that fund, the more especially when all the other property is given away by the will, for another and a different object. To hold that they could, would be not to decree an execution of the trusts of the will, but to set aside the will and to substitute another, utterly different from any views the testator ever entertained.

(The Court intimated that this proposition was too plain to admit of doubt.)

HENDERSON, Chief-Justice.—A *breach* of trust necessarily supposes, that there is a rule for the government of the trustee. The creator of the trust may prescribe what rules he pleases. In the absence of one prescribed by him, the law enjoins good faith, which includes not only what is commonly understood by honesty and integrity, but care, diligence and attention; and in matters of judgment and discretion, that they should be carefully applied. To purchase more lands, than the funds appropriated for that purpose would pay for, was a clear departure from the rule, which the testator in this case had prescribed to the executors, the trustees. Good faith and purity of motive afford them therefore no protection from

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the consequences of that act. But in the sale of the Granville lands, the testator prescribed to them no rule. The exercise of their best judgment and discretion, with vigilance and attention in obtaining the best price they could get for the lands, is the rule which the law has enjoined, and without a departure from it, they have been guilty of no breach of trust. We cannot consider the omission to take the offer of $1,000 a departure from that rule; and more especially, as the sale met the decided disapprobation of the principal *cestui que trust*, and the only one who was of age, and in whom also the testator reposed confidence, in an important part of the execution of the trust, by directing her wishes to be consulted as to the locality of the lands to be purchased.—But even without such excuse, we cannot consider a mere error in judgment, in omitting to close with that which after circumstances showed to be an advantageous offer, and which at the time was matter of doubt, to be a breach of trust. If such was the rule, it would drive trustees into disadvantageous contracts, or rather it would prevent all prudent and discreet men from assuming the character of trustees. In cases of this kind, where judgment and discretion are confided in, and no rule given, good faith, defined as it is above, should afford protection. In the present case, the gradual declension of property in price, particularly lands, is matter of history unexampled in this, or perhaps any other country. The most prudent who wished to sell have held on, from day to day, from month to month, and even from year to year, in hopes of better times. But they have as yet hoped in vain. Many of the most prudent have been protracted, and have property now in market, which when it was first brought there, would have commanded double its present price. To visit upon these trustees, who have acted with good faith, the consequences arising from acts so common throughout the country, with prudent men managing their own con-

cerns, would be applying to them rules which they never thought of subjecting themselves to, and which neither the testator nor the law imposed.

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The Master will ascertain the amount of the funds set apart for the purchase of the lands, valuing the Granville lands at the price obtained for them—he will take with him the surveyor of the County of Granville, and five freeholders, and lay off, for the purposes of the trust, as much of the land purchased by the executors as the said sum will pay for, rating the whole land at $3,000, the sum which was given for it by the executors, having a due regard to the locality of the lands and the convenience both of the *cestui que trusts* and the executors.—He will also take an account of the rents and profits of the surplus land, whilst it was in the hands of the *cestui que trusts*, so far and so far only, as it benefited them above what the fund would have purchased. I would also sequester to the use of Defendants, the interest of the widow, if I could do so without vitally interfering with that of the children; but I cannot see how that can be done. Each party to pay his own costs.

PER CURIAM.—Let a decree be made accordingly.

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Thomas J. Norfleet
v.
Goodwin Cotton and William Brittain, } From Bertie.

Where an administrator and one of the sureties to the administration bonds, were next of kin to the intestate, and upon a suit on the bond by an administrator *de bonis non*, a stranger also a surety, was alone subjected; held that he had a right in equity, to retain the share of the principal to indemnify him in full, and that of his co-surety, to equalize the loss. And that having satisfied the judgment, he had in equity, a right to recover back the shares of his principal and co-surety.

The assignor of a term for years has, in equity, no lien upon the land for the money agreed to be paid, as the consideration of the assignment.

The case as it appeared upon the pleadings and the report of the Master, was that *Henry Johnston* died intestate, and that administration upon his estate was committed to one *Alexander S. Johnston*, who gave bond for the faithful discharge of his duty, with the Plaintiff and one *William W. Johnston*, as his sureties—that among other personal estate of the intestate, the administrator sold two terms for years, amounting in all to the sum of $5,135 50—that the said terms were purchased by *William W. Johnston*, who was a brother of the intestate, and also of the administrator *Alexander S. Johnston* and the co-surety of the Plaintiff, for the sum of 5,089 dollars—that the said *William W. Johnston* never paid for the said terms—but had sold a part of them to one *Joseph S. Pugh*, who had not paid the whole of the purchase money—that *William W. Johnston* died having made a will, whereof he appointed the Defendant *Brittain* executor, who had never paid any part of the original purchase money for the said terms, and still retained possession of a part of them—and never had received the balance due from *Joseph S. Pugh* on his purchase from *William W. Johnston*. *Alexander S. Johnston* the administrator of *Henry Johnston*, died intes-

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tate, and administration upon his estate had been committed to one *David Clarke*.—That the Defendant *Cotton* had taken out letters of administration upon the goods of *Henry Johnston*, not administered by *Alexander S. Johnston*, and brought a suit on the administration bond executed by *Alexander S. Johnston* with the Plaintiff and *William W. Johnston* as sureties, and had assigned as a breach of that bond, that *Alexander S. Johnston* never had accounted with, or paid over to the next of kin of *Henry Johnston* any part of the beforementioned sum of $5,135 50—that judgment had been thereon obtained for the Plaintiff at law, against the present Plaintiff, for the sum of $5,571 25,—that the issue of fully administered had been found for *Clarke*, the administrator of *Alexander S. Johnston*, and for the Defendant *Brittain*, the executor of *William W. Johnston*—and that the Plaintiff had been compelled to discharge the whole of the said judgment, the estates of *Alexander S. & William W. Johnston*, being insolvent. That *Henry Johnston* died without issue, leaving five brothers and sisters, among whom were *Alexander S. & William W. Johnston*, who were entitled to two-fifth of the recovery made by the Defendant *Cotton*—that the estate of *Henry Johnston* was not at all indebted, and that the amount recovered by the Defendant *Cotton*, remained in his hands subject to distribution.

The Plaintiff sought 1st, to have the shares of *Alexander S. & William W. Johnston*, refunded to him for his indemnity, and 2d, to subject the residue of the leasehold interest in the hands of the Defendant *Brittain*, and the debt due the latter by *Joseph S. Pugh*, for the purchase of part of it, to the satifaction of the debt due the Defendant *Cotton;* to whose rights he claimed to be substituted.

The case was submitted without argument, by *Hogg*, for the Plaintiff, and by *Ruffin*, for the Defendants.

HENDERSON, Chief-Justice, after stating the case as above set forth, proceeded, I think that the Plaintiffs equity to have an indemnity from two-fifth of the estate

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of *Henry Johnston*, now in the hands of the Defendant *Cotton*, to which *Alexander S.* and *William W. Johnston* are entitled, is quite obvious. The action brought on the administration bond was in reality, the suit of the next of kin of *Henry W. Johnston*. The Governor, in whose name it was brought, was a mere trustee for them, and the administrator *de bonis non*, their agent. *Alexander S. Johnston*, can have no claim to an indemnity for his own mismanagement, against his own surety for the faithful discharge of his duty, yet in reality, as regards his fifth, the action on the bond was of that character, and for that purpose. Nor has *William W. Johnston* a right to seek from his co-surety an indemnity further than for one-half of the burden; and it will exhaust, as it appears, the whole of his one-fifth, to equalize the burden of the co-surety. There can therefore, be no pretence for sustaining the action, either for the benefit of the principal *Alexander S.* or the co-surety, *William W.*— And if the action ought not to have been sustained, the circumstance of the money being paid, cannot alter the rights of the parties in this Court, where the equity set up afforded no protection at law. The administrator *de bonis non*, must pay to the Plaintiff the two-fifth parts of *Alexander* and *William*.

As to the claim set up to the leasehold estates, in the hands of the executor of *William Johnston*, and the money due from *Pugh*, for the purchase of part of them from *William Johnston*, I can perceive no higher claims to them, on the part of the Plaintiff, than those of any other creditor of *William Johnston*. The payment of the purchase money by the surety gives him no specific lien; and even had he the lien of a vendor, that I believe has never been held to extend to chattel interests. As far as I can perceive at present, as to any thing except the two-fith parts of *Henry Johnston's* estate, the Plaintiff must stand as a general creditor.

PER CURIAM.—Let the decree be entered accordingly.

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Joseph J. Alston ex'r. of Robert Hill, et al.
v.
Peter Foster, administrator of John Huckaby,
} From Franklin.

Where slaves are given by will for life, with a remainder over, an assent of the executor to the legacy for life, is an assent to that in remainder.

Where an executor has assented to a specific legacy, and afterwards an execution issues against the goods of the testator, in his hands, a purchaser of that specific legacy, at a Sheriff's sale under that execution, acquires no title.

From the pleadings it appeared, that one *Benjamin Hill* died in the year 1790, having given to his wife *Mary Hill*, a life estate in sundry slaves, with a remainder to his children. That the executor of the husband assented to the legacy to the wife, and put the slaves into her possession, and soon afterwards she intermarried with the Defendant's intestate. Upon the death of the widow of the testator which happened in the year 1817, the Plaintiffs who are those in remainder, or their representative, by this bill sought a discovery of the names of the slaves and their issue, and a division of them.

The Defendant in his answer, made the discovery required, and submitted to a division except as to some of the slaves, the ancestor of whom he contended his intestate had purchased in the year 1792, after his marriage with the widow of *Benjamin Hill*, at Sheriff's sale, under an execution against the goods and chattels of *Benjamin Hill* in the hands of his executor. The Plaintiffs alleged that the Defendant's intestate had fraudulently procured this sale to be effected, and by his contrivances, had bought in those slaves at an under value. Testimony was taken to this point, but a statement of it is thought to be immaterial.

Badger, for the Plaintiff, contended, that the assent of the executor to the legacy of a particular estate to the

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wife, enured so as to vest the title in those in remainder, and cited *Bacon ab. Executors & Administrators, L.* 2, 3.

Seawell, for the Defendant, submitted the case without argument.

HENDERSON, Chief-Justice.—It is unnecessary to examine into the fraud charged upon *Huckaby*, in affecting the Sheriff's sale, under which he claims a part of the property. For by it he certainly acquired no title, be it ever so fair, as the executor of *Hill* had, before the issuing of the execution under which the sale was made, assented to the legacy to *Hill's* widow for life, whom *Huckaby* afterwards married. The Sheriff therefore was not authorized to sell, the negroes not being the estate of *Hill* in the hands of the executor. The property therefore remains in the same situation as if there had been no sale. As it is not so very clear, that the sale was fraudulently procured by *Huckaby*, he must be allowed the purchase money paid by him.

The Clerk and Master will take an account of the hire of the negroes, and the money paid by *Huckaby*.

PER CURIAM.—Decree accordingly.

Jesse Ives and Martha his wife
v.
Seth Sumner ex'r. of James Sumner,
} From Perquimons.

The lapse of thirty years, is no bar to an account of an administration. But where a legatee had given a bond to exonerate the executor from his office as if he had never qualified, this was held to be evidence of a settlement, and, unexplained, to be a bar to an account. Qu? Is not such a bond a release.

In this case the bill was filed for an account of the estate of one *Granberry Sutton*, the father of the Plaintiff *Martha*.

It appeared from the pleadings, that *Granberry Sutton* died in the year 1794, having made a will, whereof

he appointed the immediate testator of the Defendant, executor. That by his will, he left to his mother *Sarah Sutton*, an annuity of fifteen pounds for her life, and all the rest of his property to his daughter, then an infant of tender years. That before her arrival at full age, viz. in the year 1805, she married one *John Sutton*—that he died after her arrival at full age, and that she continued a widow for two years, when she married the Plaintiff *Ives* in 1812. That *James Sumner* died in the year 1823, having all his life lived in the immediate vicinity of both the husbands of the Plaintiff *Martha*—was a man of property, and abundantly able to pay all his debts—and that more than thirty years had elapsed from the death of *Granberry Sutton*, to the filing of this bill—during which time, no claim of the kind now asserted, had ever been urged by the Plaintiff *Martha*, or either of her husbands.

The Defendant in his answer, relied not only upon the lapse of time as a bar to an account, but set forth the following instrument which was proved to have been executed by the first husband of the Plaintiff *Martha*, and insisted that in law it was a release, and of course a bar to the right of the Plaintiffs to call for an account.

"Know all men that I *John Sutton*, *George Sutton* and *James Whedbee*, of &c. are held and firmly bound unto *James Sumner* of &c. in the just and full sum of ten thousand pounds, to be paid &c. December 30, A. D. 1805."

The condition of the above obligation is such, that if the above bounden *John Sutton*, his heirs, &c. do well and truly pay unto *Sarah Sutton*, (the mother of the testator *Granberry Sutton*,) the just sum of fifteen pounds a year during her natural life, and do release, exonerate and discharge in every way, manner and form, the said *James Sumner*, his heirs, executors and administrators, from the executorship to the will of *Granberry Sutton*, deceased, in as full and ample a manner as if he had never qualified thereto, then this obligation to be void.

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Kinney, for the Plaintiffs, contended, that the lapse of time formed no bar, as the trust was express; besides which, that it was explained by the infancy and coverture. To this point, he cited *Tate* v. *Greenlee*, (2 *Hawks* 486,) and *Falls* v. *Torrance*, (4 *Do.* 412.) He argued that the bond could not be construed to be a release, and if it was taken as a release, that the general words of it were to be restrained to the particular purpose for which it was given, viz. to secure the annuity to the mother; for this he cited *Liverpool Water Works* v. *Atkinson*, (6 *East.* 507,)—*Governor* v. *Matlock*, *Banner* v. *McMurray*, (*Ante* 1 *vol.* 214 & 218,) and *Knight* v. *Cole*, (*Shower's Rep.* 150.)

Gaston, for the Defendant, insisted that the bond amounted to a release—that this was proved by the amount of the condition, as well as by its terms, and the time that had elapsed since its execution. For this he cited *Cuyler* v. *Cuyler*, (2 *John. Rep.* 186,) *Deux* v. *Jeffries*, (*Cro. Eliz.* 352,) *Smith* v. *Mapleback*, (1 *T. R.* 446,) 2 *Sand.* 48, *a.*

Upon the authority of *Petty* v. *Harman*, (*ante* 191,) he argued, that the execution of the bond closed the trust between the parties, and from that period, the effect of time operated as a bar.

HALL, Judge.—It is admitted by both the Plaintiff and Defendant, that *James Sumner*, the executor, during his life, and at his death, which happened A. D. 1823, had an ample estate, and fully sufficient to pay any demand which Plaintiffs might have against him; that Plaintiff *Martha* was a *feme sole* and of full age, A. D. 1812; that this suit was not brought until the year 1825. After such a lapse of time, although it forms no bar to the suit, it may be apprehended that exact justice could not be done, if the parties were to go into a settlement of their accounts. This however must be done, if the bond introduced by the Defendant does not interpose a sufficient bar.

This bond was executed A. D. 1805, by *John Sutton*, the first husband of the Plaintiff *Martha*, about eight or nine years after the death of the testator. It is given in the sum of £10,000, conditioned on the part of *John Sutton* "to release, exonerate, and discharge in every way, manner and form, *James Sumner*, his heirs, executors and administrators from the executorship to the will of *Granbury Sutton* deceased, in as full and ample a manner as if he had never qualified thereto." It must be understood from this strong language, that a settlement had taken place between the parties, the bond must be taken as proof of it, in the absence of any explanatory evidence. It is true that the bond has also a condition, that *John Sutton* shall pay to *Sarah Sutton*, the mother of *Granbury*, the sum of £15 a year during her natural life. But this is a distinct stipulation from the preceding one, and a distinct breach might be assigned for the non-performance of either. It cannot by any fair construction of the bond be believed, that it was given to guard the executor *James* from the demand only of *Sarah Sutton*. It was also given to guard him from the demand of the obligor *John Sutton*, husband of the Plaintiff *Martha*.

PER CURIAM.—Let the bill be dismissed with costs.

Lewis Ellis
v.
William Ellis.
} From Edgecomb.

Where the Plaintiff seeks specific performance of an agreement for the sale of lands, and the Defendant denies the contract as alleged and relies upon the statute, (1819, *ch.* 1016.) parol evidence cannot be received, even upon the ground of part performance, to shew the contract.

Whether if the contract so partly performed were admitted by the answer, the execution of it could be decreed since the statute. *Qu?*

This cause came a second time before the Court, upon the petition of the Defendant to rehear the interlocutory

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decree made at June Term, 1828. The case as then reported is found in this volume, (*ante* 180,) and it is only necessary to state further, that by the answer of the Defendant, the contract as alleged by the Plaintiff, was denied; but the Defendant admitted he had contracted to sell to the Plaintiff, and averred the terms of the contract to be, that the Plaintiff should give a note of *Stanton's* with good security for $700, his own notes for the residue, and a deed of trust upon the land to secure the payment of the purchase money. Upon this contract the answer averred that the Plaintiff was led into possession, and the Defendant submitted to perform the contract so stated by him, and pleaded the act of 1819, *ch.* 1016, in bar of relief upon the contract alleged by the Plaintiff and denied by the answer.

Proofs had been taken before the hearing, and the contract resting entirely in parol, there was great diversity in the testimony of the different witnesses.

Upon the petition for re-hearing, the case was very elaborately discussed by *Gaston* and *Badger*, in support of the petition, and by *Hogg*, in support of the decree, but the Reporter is unable to present to the profession a full view of the argument, and is unwilling to attempt an abridgment.

HALL, Judge.—Whether, if the contract, as set forth by the Complainant, was admitted by the Defendant, and the Plaintiff had taken possession of the land in consequence thereof, such contract ought to be carried into effect since the passage of our statute of frauds, I give no opinion.

The Plaintiff in this case sets forth one contract which the Defendant denies, and sets forth another contract, widely different from it, both by parol—and it is a question, whether either of them was understandingly entered into by the parties. To go into testimony to ascertain whether any, and what contract the parties have entered

into, would be laying aside the act of Assembly altogether and sapping its usefulness. Indeed if the evidence preponderated in favor of the Plaintiff, as perhaps it does, the enquiry would be equally improper. I am therefore of opinion, that the decree should be reversed, so far as it ordered the execution of the contract, because I think the circumstance of the Plaintiff's taking possession of the land does not obviate the objection and impropriety of going into an inquiry, to ascertain what the contract really was.

PER CURIAM.—Let the decree complained of be reversed, and let an account be taken by the Clerk of the costs and damages sustained by the Plaintiff in consequence of the Defendant's suing him at law and turning him out of possession of the lands mentioned in the bill, and let the cause be retained for further directions upon the coming in of the report.